Supreme Court, U. S.
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No. 76- 76-831

In The
Supreme Court of the United States
October Term, 1976

Mohammed Mustafizur Rahman,
Petitioner

v.

Immigration And Naturalization Service

Petition For A Writ Of Certiorari To The
United States Court Of Appeals For
The Sixth Circuit

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Reasons for granting the writ	8
Conclusion	16
Appendix A	17
Appendix B	18

CITATIONS

Cases:

Fong Haw Tan v. Phelan, 333 U.S. 6, 10, (1948)	8
Gastelum Quinones v. Kennedy, 374 U.S. 469, 479 (1963)	8, 9

Ng Fung Ho v. White,
259 U.S. 276,284 (1922)..... 8

Nunez Torres, Matter of,
11 IN 501 (1966)..... 15

Rowoldt v. Perfetto,
355 U.S. 155,120 (1957)..... 8

U.S. v. Belgrave, 484 F.
2d 915 (3rd Cir. 1973)..... 14

Woodby v. INS, 385 U.S.
276, 286 (1966)..... 2,8,9,10,15

Statutes:

Immigration and Nationality Act
Sec. 212 (a) (22), 8 U.S.C.
1182 (a) (1)..... 3,6
Sec. 241 (a) (1), 8 U.S.C.
1251 (a) (1)..... 2,6
28 U.S.C. 1254 (1)..... 2
50 U.S.C. App.467(c)..... 4

Regulations:

8 C.F.R. 242.14 (a)..... 9
32 C.F.R. 1622.11..... 4
32 C.F.R., Part 1642..... 13

Miscellaneous:

Pres.Proc.4313, 39 F.R.
33293..... 15
Exec. Order 11803,
39 F.R. 33297..... 15
U.P.I. story of
Nov. 27, 1976..... 15

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No. 76-

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Immigration And Naturalization Service

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The Sixth Circuit

The petitioner hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The brief per curiam opinion of the Court of Appeals (App. A, infra) is unreported. The opinion of the Board of Immigration Appeals (App. B, infra) is also unreported.

JURISDICTION

The judgment of the Court of Appeals was entered October 26, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether a deportation order concluding that petitioner departed from and remained outside the United States for less than a year in order to evade military service, which is based entirely on suspicion and inference, without any direct supporting evidence and is opposed to all the direct evidence in the record, is valid in the light of Woodby v. INS, 385 U.S. 276 (1966), which declares that a deportation order is invalid unless supported by clear, unequivocal, and convincing evidence.

STATUTES INVOLVED

Section 241 (a) (1) of the Immigration and Nationality Act, 8 U.S.C. 1251 (a) (1) provides for deportation of any alien who:

> at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

Section 212 (a) (22) of the Immigration and Nationality Act, 8 U.S.C. 1182 (a) (22) provides for the exclusion of:

> aliens who are ineligible to citizenship, except aliens seeking to enter as nonimmigrants; or persons who have departed from or who have remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency, except aliens who were at the time of such departure nonimmigrant aliens and who seek to reenter the United States as nonimmigrants;

STATEMENT

Petitioner is a citizen of Bangladesh (formerly Pakistan), who was lawfully admitted to the United States as a permanent resident immigrant on July 15, 1966. On February 27, 1967 he registered for selective service under

the law then in effect [1] and was classified 1-A. R. 147-152.[2] He appealed that classification on the ground that he was unable to perform military service because of his religious practices and beliefs, and on April 20, 1967 he was reclassified 1-A-O (R. 144-160) as a conscientious objector available for noncombatant military service only. 32 CFR 1622.11.

On May 8, 1967 petitioner appealed his 1-A-O classification, and requested the assistance of a government appeal agent. R. 161. No action was taken on his appeal or his request for such assistance, but the selective service records indicate that a notice was thereafter sent to the petitioner on June 30, 1967, directing him to report for physical examination on July 21, 1967. R. 144, 162. The selective service records also indicate that a second notice was sent to petitioner on August 14, 1967, directing him to report for a physical examination on August 25, 1967. R. 163. Petitioner did

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1/ Liability for compulsory military service expired July 1, 1973, and has not been renewed. 50 U.S.C. App. 467 (c)

2/ "R" references are to the Certified Administrative Record filed in the Court of Appeals.

not appear for such physical examination, and repeatedly has denied receiving either of such notices. R. 61, 64. On November 16, 1967 the draft board, on its own volition, changed petitioner's selective service classification to 5-A, over the age of military service. R. 114, 191.

Petitioner left the United States on July 19, 1967 to visit his former home in Bangladesh. He has repeatedly testified, with ample confirmation in the record, that this trip was made because his mother and wife were seriously ill, and that he remained in Bangladesh for some time after their recovery, because of his mother's request for assistance in managing her property. R. 68, 80, 85, 191, 195, 202, 204, 206. He remained away from the United States for almost a year, and was readmitted July 17, 1968 as a returning lawful resident. R. 196. On July 25, 1968, about a week after returning to the United States, petitioner reported in person to his draft board, asked about his selective service classification and requested that a new card be issued to him to replace one he had lost. R. 167, 169. A duplicate card, showing 5-A classification, was issued to him the same day. R. 207. The selective service authorities never sought to prosecute petitioner for any alleged delinquency and did not thereafter seek to require him to perform military service. R. 114.

In 1971, more than three years after his return from Bangladesh, deportation proceedings were instituted against petitioner, charging that he had departed from and remained outside the United States to evade military service and thus was subject to deportation under Secs. 241 (a) (1) and 212 (a) (22) of the Immigration and Nationality Act, 8 U.S.C. 1251 (a) (1) and 1182 (a) (22). (See p. 2 ante). R. 128. A hearing before an immigration judge was held on January 9, 1974. R. 52 et seq.

The witnesses who testified at the deportation hearing were all called by the government. Respondent testified extensively, and repeatedly stated that he had left the United States to visit his sick mother and not to evade military service. R. 68, 80, 185, 195. He denied receiving the notices of the draft board or knowing about them until he returned to the United States and reported to the draft board. R. 64, 65. His testimony was directly supported by his brother and sister-in-law, both testifying under government subpoena. R. 84-85, 90-92. Additional support was provided by a medical report and an affidavit of the mother confirming her illness. R. 205, 206. There was also testimony of two clerks employed by Selective Service, who identified admittedly incomplete records relating to petitioner, which were received in evidence. These records included handwritten notes of telephone calls allegedly made by petitioner's sister-in-law.

According to one such notation, the sister-in-law is alleged to have stated that she was unaware of petitioner's whereabouts. R. 112, 165. The other handwritten notation reports an alleged conversation from an unnamed sister-in-law stating that petitioner wished to return to the United States if he was not wanted by the draft. R. 97, 191. The sister-in-law denied at the hearing that she had made any such telephone calls. R. 85, 119.

Over a year after the hearing, the immigration judge issued a decision finding the respondent deportable, relying chiefly on the two telephone calls allegedly made by the petitioner's sister-in-law, without mentioning her denial that she had made such calls. R. 37 et seq. The Board of Immigration Appeals affirmed, finding the deportation order adequately justified. However, a dissent by one member of the three-member panel found that the government had not borne its burden of establishing deportability by clear, unequivocal and convincing evidence. App. B, infra, R. 6 et seq. The Board's order was affirmed by the United States Court of Appeals for the Sixth Circuit, in a brief memorandum which merely asserted "that in the circumstances reflected by the record it cannot be held that the essential allegations made by the Immigration and Naturalization Service and the corresponding findings of fact of the immigration judge have not been established by the requisite degree of proof." (App. A, infra)

REASONS FOR GRANTING THE WRIT

1. This Court has often noted the grave consequences of a deportation order. Expulsion from the United States has been characterized as "a drastic measure and at times the equivalent of banishment or exile" (Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)), "which can destroy lives and disrupt families" (Gastelum Quinones v. Kennedy, 374 U.S. 469, 479 (1963)), and can deprive the deportee "of all that makes life worth living" (Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)). These observations aptly describe the predicament of this petitioner, who has been a resident of the United States for over 10 years (except for a single absence of less than a year), and whose ejection would perpetually bar him from returning to his home and rejoining his family in this country.

In Woodby v. INS, 385 U.S. 276, 285 (1966) this Court observed that it "has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake the bonds formed here and go to a foreign land where he often has no contemporary identification." Consequently, in fashioning criteria which would assure the requisite "solidity of proof" (Rowoldt v. Perfetto, 355 U.S. 155, 120 (1957), the Court established a rule that:

> no deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true.

The requisite "solidity of proof" is emphasized by the restatement of this rule in the administrative regulations, which declare, 8 CFR 242.14 (a):

> A determination of deportability shall not be valid unless it is found by clear, unequivocal and convincing evidence that the facts alleged as grounds for deportation are true.

2. The burden of proof to establish deportability manifestly is on the Government. Gastelum Quinones v. Kennedy, 374 U.S. 469 (1963). And it can satisfy this burden only by producing evidence which is clear, unequivocal, and convincing. Thus, this burden is not met by reliance on suspicion, speculation and presumption. Without solid and unequivocal evidence in the hearing record "no deportation order may be entered" (Woodby, supra), and a finding of deportability not supported by such evidence is not "valid" (8 CFR 242.14 (a)).

The immigration judge and the Board of Immigration Appeals asserted that the deportation

order was supported by clear, unequivocal, and convincing evidence. But the administrative authorities misread Woodby and their own regulations if they suppose that a mere assertion of this conclusion satisfies the burden imposed on them. And we believe the Government was equally mistaken when it argued in the Court below (Resp. Brief p. 7) that a reviewing court was powerless to determine whether the evidence satisfied the criteria established by this Court in Woodby. We submit that these misconceptions denote a misapplication of the pronouncements of Woodby, and warrant a review and correction by this Court. In our view the adequacy of the supporting proof, and the administrative compliance with Woodby, can be appraised only by an examination of the record.

We share the view of the dissenting member of the Board of Immigration Appeals (R. 6-7) that such an examination demonstrates that the government:

> has not borne its burden of establishing by clear, convincing, and unequivocal evidence that [petitioner] departed from the United States for the primary purpose of avoiding or evading training or service in the Armed Forces in a period of national emergency.

In seeking to establish deportability the government produced no direct evidence. Indeed, the

only direct evidence it presented, in the testimony of petitioner and his relatives, flatly disputed the government's assumptions. Instead, the government's evidentiary structure rested entirely on the following equivocal items:

> 1. A Selective Service record showing that two notices to report for physical examination were mailed to petitioner, without response, one of which directed him to report for examination on July 21, 1967, two days after he admittedly left the United States on his visit to Bangladesh. These letters were sent by ordinary mail and there is no proof that either of them was recieved by the petitioner, other than the fact that there are no returned letters in the file. R. 104-106, 191.
>
> 2. A typewritten notation on a summary sheet relating to actions by the draft board stating that: "Reg's sister-in-law re: #304 -- does not know of whereabouts of Reg. Believed to have left U.S. to return to Pakistan." R.191. The sister-in-law is not identified in this notation. However, a written memorandum of this conversation identifies the sister-in-law as Mrs. Rahman. R. 165.

3. A written notation of a telephone call March 20, 1968 from an unnamed sister-in-law "stating that registrant wishes to return to the United States if he is not wanted by the draft." R. 191.

We do not deny that this evidence was sufficient to generate suspicion or an inference that petitioner may have sought to evade military service. But we repeat that suspicion and inference cannot satisfy the exacting standard of proof needed for a valid deportation order. There is no direct evidence to support the government's hypothesis, which is opposed by considerable evidence in the record, both direct and documentary, including the following:

A. The direct testimony of petitioner, called as a witness by the government, that he had never received the draft board notices, and his uncontradicted evidence that he had gone to Bangladesh because of the critical illness of his mother and his wife and had remained for almost a year to help his mother manage her property.

B. The direct testimony of petitioner's brother and sister-in-law, also called as witnesses by the government, denying receipt of the draft board notices, denying that they had made any telephone calls to the draft

board, and stating that petitioner's departure was occasioned by the illness of his mother and wife.

C. A medical certificate and the affidavit of petitioner's mother, confirming her illness. R. 205-206.

D. The draft board's action in reclassifying petitioner 5-A, over the age for military service, within four months after his departure from the United States. R. 114, 191. It is conceded that selective service never sought to prosecute petitioner for draft evasion or to require him to perform military service after his return to the United States. R. 114. See 32 CFR, Part 1642.

E. Direct evidence by petitioner (R. 167, 168) confirmed by a draft board witness (R. 115) and its records (R. 207), that within one week after his return to the United States in 1968 he reported to his draft board, asked about his selective service classification, and received a duplicate registration certificate to replace the one he had lost.

An examination of the entire record thus demonstrates that the government relies solely on

petitioner's departure from the United States shortly before he was supposed to report for a physical examination, his delinquency for a period of four months (between the dates of his scheduled physical examination and his reclassification 5-A), and the notations of alleged telephone calls by a supposed sister-in-law. As we have suggested this evidence may be sufficient to generate a reasonable suspicion, but it hardly constitutes the solid proof needed to justify a deportation order.

The selective service records may generate a presumption of regularity, but the force of this presumption is considerably diminished when confronted with direct denials by live, and unimpeached, witnesses. Under such circumstances we doubt that the government's reliance on presumption can relieve it of the need to present convincing evidence to establish deportability. See U.S. v. Belgrave, 484 F. 2d 915 (3rd Cir. 1973).

We find no adequate and unequivocal evidence in this record which establishes clearly and unequivocally that petitioner left the United States to evade military service. In our view the government chose to disregard all the direct evidence and to rely instead on dubious inferences and hearsay. On its face, the assumption of draft evasion is undermined by the fact that petitioner was subject only to noncombatant duty because of

his classification as a conscientious objector, and that his appeal from that classification was still pending at the time of his departure. Moreover, the suspicion of evasion is negated by the relatively brief duration of his absence of less than a year, the direct and uncontradicted evidence that he left to visit his sick mother and wife, and the fact that he reported to his draft board immediately after his return to the United States.

We respectfully submit that the deportation order does not comply with this Court's mandate in Woodby v. INS, since it is not based on clear, unequivocal, and convincing evidence that petitioner's absence from the United States was undertaken primarily for the purpose of evading the draft. See Matter of Nunez-Torro, 11 IN 501 (1966). Moreover, the imposition of perpetual banishment on this petitioner for a brief delinquency ten years ago is inconsistent with the limited amnesty proclaimed by President Ford in 1974 (Pres. Proc. 4313, 39 F. R. 33293; Exec. Order 11803, 39 F. R. 33297) and the more comprehensive amnesty for Vietnam-era draft evaders which has been announced by President-elect Carter as one of the earliest acts of his incoming administration. See UPI story of Nov. 27, 1976. In our view the deportation order in this case was invalid and improper.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

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APPENDIX A

OCTOBER 21, 1976

NO. 75-2194

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MOHAMMED MUSTAFIZUR RAHMAN :
:
Petitioner :
:
v. : ORDER
:
IMMIGRATION and NATURALIZATION :
SERVICE :
:
Respondent :
:
- - - - - - - :

Before: CELEBREZZE, PECK, and McCREE, Circuit Judges.

This matter having come on for consideration on the petitioner's petition to review a deportation order issued by the respondent, and it having been concluded that in the circumstances reflected by the record it cannot be hald that essential allegations made by the Immigration and Naturalization Service and the corresponding findings of fact of the immigration judge have not been established by the requisited degree of proof, and accordingly,

IT IS ORDERED that the decision of the Board of Immigration Appeals be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

/S/ John P. Hehman
John P. Hehman, Clerk of Court

APPENDIX B

United States Department of Justice
Board of Immigration Appeals
Washington, D. C. 20530
SEP 17 1975

File: A17 076 149 - Detroit

In re: MOHAMMED MUSTAFIZUR RAHMAN

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Harry Kobel, Esq.
2156 City National Bank Bldg.
Detroit, Michigan 48226

ON BEHALF OF I&N SERVICE:

George Indelicato
Appellate Trial Attorney

ORAL ARGUMENT: July 16, 1975

CHARGE:

Order: Sec. 241 (a)(1), I&N Act (8 U.S.C. 1251 (a)(1)) - Excludable at time time of entry under section

212 (a)(22), I&N Act (8 U.S.C. 1182 (a)(22)) - departed to avoid training or service in the Armed Forces

APPLICATION: Termination of proceedings

In a decision dated January 21, 1975, the immigration judge found the respondent deportable as charged and granted him the privilege of departing voluntarily from the United States within 30 days in lieu of deportation. The respondent has appealed from that decision. The appeal will be dismissed.

The alien respondent is a native and a citizen of Pakistan. He was originally admitted to the United States for permanent residence in 1966. On January 13, 1967, the respondent registered under the Selective Service Act and was classified 1-A, available for military service. He appealed from that classification, and on April 20, 1967, he was reclassified in Class 1-A-O, conscientious objector available for noncombatant duty. The respondent submitted an appeal from that classification on May 4, 1967, and he also requested the aid of a Government appeal agent. The respondent failed, however, to prosecute his appeal within the allotted 30-day period.

On June 30, 1967, the respondent was mailed a notice directing him to appear for an Armed

Forces physical examination on July 21, 1967. That notice was mailed to the respondent's correct address, which was the residence of his brother and sister-in-law in Detroit, Michigan. The respondent departed from the United States to Pakistan on July 19, 1967, without informing the Selective Service and without obtaining a permit from the Selective Service authorizing his departure from the United States.

The respondent remained in Pakistan for one year without informing the Selective Service of any change in address. During that time, on August 14, 1967, a delinquency notice was mailed to the respondent at his brother's address. On the same day, the respondent also was mailed another notice to report for a physical exam, this one on August 25, 1967. The next day, the respondent's sister-in-law, his brother's wife, called the Selective Service and stated that she had no idea of the respondent's whereabouts except that he was supposed to have departed from the United States to return to Pakistan (Ex. 3, pp. 1, 22).

On November 16, 1967, the respondent was automatically reclassified in Class 5-A, over the age of liability for military service, having turned 26 on September 1, 1967. On March 20, 1968, the respondent's sister-in-law once again telephoned the local Selective Service and stated that the respondent wished to return to the United States if he was not wanted by the draft. The respondent returned to the United States on July 17, 1968.

At the hearing, the respondent denied ever having received the letters requiring him to report for physical examination, the delinquency notice, or the notice of his reclassification to Class 5-A. He claimed to have gone back to Pakistan for the sole purpose of visiting his sick mother and to have remained there to take care of her properties. In support of this claim, he submitted an affidavit from his mother and a certificate from his mother's physician in Pakistan (Ex. 5). The physician's letter, however, indicates that the respondent's mother was only under his care until August 14, 1967, which would not explain why the respondent stayed out of the country for an additional eleven months. It also was brought out at the hearing that the respondent's 17-year-old sister was

living with his mother at that time, and the respondent's married brother lived only 46 miles away from his mother (Tr. p. 72). The respondent also testified that although he allegedly had remained to help his mother look after her land, he was not aware who, if anyone, was presently helping her to do this.

The respondent's sister-in-law testified at the hearing that no mail from the Selective Service addressed to the respondent had been received at her address. She also denied calling the Selective Service (Tr. pp. 33, 67). The Government called two employees of the local Selective Service office who confirmed that they had received telephone calls from a woman identifying herself as the respondent's sister-in-law (Tr. pp 45-6, 59-60).

The record establishes that the respondent departed from the United States two days before he was supposed to report for his Armed Forces physical exam. Although the respondent denied having received notice to report for this physical exam, such notice was properly mailed to his correct address at the residence of his brother. This letter was not returned to the Selective Service (Tr. pp. 52-3). Consequently, we shall

presume that the letter was received at the respondent's address. See C. McCormick, Evidence § 343 (2d ed. 1972). We find the respondent's disclaimer of receipt of the notice not to be worthy of belief. Nor do we believe his claim that his primary purpose in departing the United States on July 19, 1967 was to visit his sick mother, and that he remained thereafter for the sole purpose of managing her property.

We agree with the immigration judge that the Service has established by clear, convincing, and unequivocal evidence that the respondent departed from the United States for the primary purpose of avoiding or evading training or service in the Armed Forces in a period of national emergency. See Matter of Nunez-Toro, 11 I&N Dec. 501 (BIA 1966). Consequently, he is deportable under section 241 (a)(1) of the Act by reason of section 212 (a)(22) of the Act.

Counsel has cited Matter of Yorke, unreported, A8 589 645 (BIA January 24, 1975), and Matter of Herzig, unreported, All 698 906 (BIA December 3, 1968), in support of the respondent's appeal. However, both of those cases involved factual determinations that the alien in quenstion had not left the United States for the purpose of evading training or service in the Armed Forces. In the

present case, the evidence supports the opposite conclusion.

The immigration judge's decision was correct. The appeal will be dismissed.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order, the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the District Director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

/S/ David L. Milhollan
Chairman

United States Department of Justice
Board of Immigration Appeals
Washington, D.C. 20530
SEP 17 1975

File: A17 076 149 - Detroit

In re: MOHAMMED MUSTAFIZUR RAHMAN

IN DEPORTATION PROCEEDINGS

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ON BEHALF OF I&N SERVICE:

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212(a) (22), I&N Act [8 U.S.C. 1182(a)(22)]- departed to avoid training or service in Armed Forces.

APPLICATION: Termination of proceedings

DISSENTING OPINION: Louisa Wilson, Board Member

I respectfully dissent.

I think that the government has not borne its burden of establishing by clear, convincing, and unequivocal evidence that the respondent departed from the United States for the primary purpose of avoiding or evading training or service in the Armed Forces in a period of national emergency, and that he was therefore not inadmissible at the time of entry under section 212(a)(22) of the Immigration and Nationality Act. I would sustain the respondent's appeal.

/S/ Louisa Wilson
Louisa Wilson
Board Member